FOR ARGUMENT No. 89-5691

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRASIEL L. HUGHEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The City of New York, like many other communities, is regularly victimized by the corrupt acts of municipal employees and others who do business with the City. The City has

found that the traditional methods of enforcement and punishment are often inadequate to deal with the volume and variety of corruption cases. Criminal restitution pursuant to the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-3664 offers a promising adjunct to traditional modes of punishment in cases involving municipal corruption.

The City of New York is deeply concerned about the practical implications of petitioner's arguments. The City is harmed by an array of crimes that present especially compelling cases for the use of restitution. Yet because of the prevalence of plea bargaining, restitution as an effective remedy would be eviscerated if it were limited, as petitioner proposes, to the counts on which the defendant was convicted. The Court of Appeals correctly recognized this fact and amply justified its conclusion allowing broader restitution on the basis of the statutory language, history and policy. United States v. Hughey, 877 F.2d

1256 (5th Cir. 1989). The City of New York here emphasizes the importance of restitution and the need to preserve it as an effective remedy. Accordingly, the City of New York respectfully submits this brief, pursuant to Rule 37.4 of the rules of this Court, in support of the respondents' brief for affirmance.

SUMMARY OF ARGUMENT

The City of New York ("The City") aggressively seeks restitution in all major state and federal criminal prosecutions in which the City is a victim. Restitution serves multiple purposes. At the most basic level, it replenishes the public fisc. Restitution adds to the deterrent effect of criminal prosecutions. It is rehabilitative because it alerts defendants to the consequences of their crime to their city and their fellow citizens. Finally, restitution helps to restore the public's trust in their government by demonstrating that abuses of governmental integrity will not be tolerated. Restitution offers

these benefits at virtually no cost to judicial resourses.

The City seeks restitution in a wide variety of cases, but the most prevalent are those in which defendants have committed a large number of similar events such as bribes or kickbacks. In such cases, the defendant typically pleads guilty to one or two counts of the indictment. Therefore the City would achieve next to nothing through restitution if petitioner's arguments were adopted. Thus, especially for the victims of governmental corruption, restitution for damage caused by all acts significantly connected to the crime of conviction must be available.

The language of the Victim and Witness Protection Act, as well as its legislative history and its interpretation by the lower courts which daily are confronted with the realities of the criminal justice system, permits trial courts to award restitution in amounts greater than that charged in the crime of conviction. Indeed,

courts are authorized to go beyond the counts charged in the indictment to all substantially related acts when determining the amount of restitution.

ARGUMENT

THE VICTIM AND WITNESS PROTECTION ACT PERMITS A COURT TO ORDER RESTITUTION FOR DAMAGE CAUSED BY ALL ACTS SIGNIFICANTLY CONNECTED TO THE CRIME OF CONVICTION

I. RESTITUTION SERVES A NUMBER OF IMPORTANT PUBLIC POLICIES.

Restitution is a uniquely effective response to crime. Rather than requiring expenditures of the government, it reimburses the victim. Rather than permitting a defendant to think of punishment as simply the cost of doing his or her (criminal) business, it takes away all the benefits of that business. And finally, rather than requiring separate proceedings or lawsuits, it is fast, efficient and certain -- providing a benefit to prosecutors and defendants as well as the courts.

Since restitution is an economic response to crime, it is important to recognize the financial benefits of this sentencing tool. In an era of tight budgets and crowded prisons, restitution replenishes the public fisc by requiring the defendants to pay back all he or she has stolen, directly or indirectly. The Victim and Witness Protection Act, 18 U.S.C. §§ 3663 - 3664 (formerly 18 U.S.C. §§ 3579-3580) ("The Act"), focuses not on the benefit to the defendant but on "the amount of the loss sustained by any victim." Id. § 3664(a). This focus reflects a change from the traditional focus of restitution. Restitution was generally considered a civil remedy designed to take away misgotten gains from wrong-doers. See W. Prosser, The Law of Torts (4th ed. 1971) § 94, p. 628. Congress's explicit shift in the focus of the statute reinforces the mandate to read it so as to fully effectuate its goal -- compensating the victim.

Restoring to the victim "the amount of the loss" provides the victim -- and taxpayers generally when a governmental unit is the victim -- a substantial benefit. For example, when a restaurant inspector takes bribes to overlook health code violations, the City is injured not only by the loss of penalties for the violations, but also by the amount of the inspector's salary. The City has paid the inspector for honest service but has not received it; the inspector has taken the money under false pretenses. Restitution, unlike any other remedy, can compensate the City for this loss of resources.

A second benefit of restitution is that, when systematically and aggressively pursued, it adds to the deterrent effect of criminal prosecutions. Restitution, unlike jail time, takes away the fruits of the crime. City employees are instructed by each award of restitution that the City will prosecute corrupt City officials and force them to pay -- literally -- for the damage they have

inflicted on the City. Although the City discharges virtually all corrupt employees upon conviction, the City's experience has been that this does not always leave them without assets. They often obtain employment in the private sector. Additionally, many corrupt City employees may still be able to retain their pension benefits.

Therefore the threat of restitution is real to these people because they have something more important than a job to lose. In the ultimate analysis, the threat of losing the ill-gotten gains may even provide a greater deterrent than the threat of a short prison term.

Moreover, restitution need not be draconian to be effective. Because the Act allows criminals to pay restitution over a period of years -- and explicitly directs sentencing judges to evaluate the defendant's ability to pay -- the City is able to obtain fair compensation from its former employees and others without bankrupting them.

In the end, this balancing makes restitution a more credible, and thus more effective, remedy.

Third, restitution enables the City to force corrupt City employees, City contractors and others to face up to the consequences of their acts without adversely affecting their prospects for rehabilitation. Arguably, restitution enhances one's chances for rehabilitation. This Court has recognized these salutary effects of restitution: "Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the state as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine." Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986).

The City also seeks restitution for its retributive effects, as a demonstration to the City's taxpayers that the City will not tolerate personal enrichment at public expense and subversion of vital City services by a few corrupt individuals. The City places its employees in positions of public trust, and they are paid in large measure for their honesty and integrity. If the City cannot count on that integrity, the employee's services are not merely useless, but actually harmful to the City. "Any government agency ... that is vested with the public's interest is grievously compromised when its employees and agents abuse their position to promote their own economic gain." United States v. Gallup, 812 F.2d 1271 (10th Cir. 1987). Unfortunately, unlike most individual victims, the City is associated with its victimizer, and tarred by his acts. The public often perceives that conviction of a single corrupt City official indicates that other malfeasors remain on the City

payroll, or at the very least that corruption is tolerated by a passive City bureaucracy. By seeking restitution the City demonstrates that it is not a passive victim.

Historically, the primary purpose of restitution was not to compensate the victim, but "to protect the offender from violent retaliation from the victim or the community. It was a means by which the offender could buy back the peace he had broken." Note, "Victim Restitution in the Criminal Process: A Procedural Analysis," 97 Harv. L. Rev. 931 (1984). Today the City uses restitution in part to protect against public cynicism and disgust, and as a means to restore faith in government.

Finally, the City uses restitution to quickly repair the harm caused by municipal corruption and to promote judicial economy. In virtually all cases where it is a victim, the City seeks recovery for its loss. When such recovery is not granted through restitution in a criminal

proceeding, the City is forced to sue the criminal separately, in a civil action for damages. This demands a separate civil lawsuit which further expends City resources and burdens the courts. Instead of taking years to resolve these matters in civil actions, an award of criminal restitution can help repair the damage done by a criminal act in a single proceeding. Both the City and the defendant are able to put the matter behind them.

In sum, restitution provides a response to crime that is necessary and unique. It is crucial to the maintenance of order and the public's faith in government that restitution remain available as an effective tool.

II. RESTITUTION IS ESPECIALLY APPROPRIATE WHERE A GOVERNMENT IS VICTIMIZED.

The facts of petitioner's charged crimes are similar to the prevalent pattern of crimes against the City and other governments: a series of acts, each individually fairly small, that add up to large sums. In such cases, it is especially

important that the defendant not escape restitution for all his acts merely because criminal justice is served by a plea of guilty to just one act.

A review of recent cases in the City demonstrates this pattern. For example, the City sought restitution from restaurant inspectors who took bribes to ignore health code violations. An individual bribe could have been just a meal or $200 in cash. The salary of the inspector during any one instance of bribe-taking is minimal. Yet over ten years the bribes add up: one inspector boasted that he had over $100,000 hidden away. Similarly, the cost to the City of having useless -- or worse -- inspectors on the payroll adds up. Yet unless restitution is awarded for more than the one count of bribery to which most inspectors pled guilty, the City will be deprived of any effective remedy to redress this corruption.

In a similar fashion, the City has sought restitution for all the damage caused by social

service workers who installed a rogue telephone extension at work through which they and others made personal calls. Because they told their friends of this phantom billing number, the City found itself with a telephone bill of over $500,000. Unelss the Act is read as the Court below read it, restitution would be meaningless: restitution for only one count of unauthorized use would entitle the City to the cost of a single telephone call.

Numerous other cases demonstrate the same point: Prison guards repeatedly smuggle drugs to inmates of City jails, companies falsify records and short-change the City with each truckload of asphalt and operators of welfare hotels give the welfare recipients cash at discount rather than a room for their rent check. In each case, the City can be made whole only by restitution based on the entire on-going scheme, not on the one act to which the defendant pled guilty. Thus, it is of great importance that the judgment below, and

the Fifth Circuit's reading of the Act, be affirmed.

III. THE ACT PROVIDES DISTRICT JUDGES THE AUTHORITY TO AWARD RESTITUTION FOR ALL ACTS SIGNIFICANTLY CONNECTED TO THE CRIME OF CONVICTION

Examination of the language of the Act, its legislative history, and case law interpreting the statute all demonstrate that Congress intended to allow courts to order restitution for the total amount of loss caused the victim by a defendant's overall course of related criminal conduct. If the Act does not allow such orders of restitution, it is virtually worthless to the City and other similarly situated victims of crimes.

Congress passed the Act to ensure that restitution to victims of crimes is a central consideration, not an "occasional afterthought" in federal sentencing. S. Rep. No. 532, 97 Cong. 2d Sess. 30, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2536. The Findings and Purposes included in the Act itself state that one

of the purposes of the Act is "to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." Pub.L. No.97-291, § 2, 96 Stat. 1249, reprinted in note following 18 U.S.C. § 1512 (1982). The report of the Senate Judiciary Committee stated that "the premise of [§ 3663] is that the court in devising just sanctions for adjudicated offenders should insure that the the wrongdoer make goods [sic], to the degree possible, the harm he has caused his victim." 1982 U.S. Code Cong. & Ad. News at 2536. It would contradict this fundamental purpose of the Act to limit restitution to the damage caused by the charge pleaded to by the defendant.

The language of the statute contemplates that courts will consider the total amount of the victim's loss in determining the amount of restitution ordered. Section 3664(a) provides

that "[t]he court, in determining ... the amount of such restitution, shall consider the amount of the loss by any victim as a result of the offense" and that it shall consider "such other factors as the court deems appropriate." Under subsection (a) the amount of the victim's loss is not set as the absolute maximum possible restitution, but only as a factor that the court must "consider." Added flexibility is given by the direction that the court consider such "other factors" as it deems appropriate.

Additionally, § 3664(e) gives estoppel effect, in a subsequent civil proceeding, to "[a] conviction of a defendant for an offense involving the act giving rise to restitution under [§ 3663]." 18 U.S.C. § 3664(e). If Congress intended to limit orders of restitution to the loss caused by the specific counts pleaded to by defendants, the words "involving the act" in § 3664(e) would be superfluous. As the Second Circuit stated in United States v. Berrios, 869 F.2d 25, 29 (1989):

"we think the inclusion of [this] phrase implies that the acts for which restitution may be ordered must be related to the offense of which the defendant is convicted, but that those acts may extend beyond the boundaries of the offense itself."

Comparison of the Victim and Witness Protection Act with its predecessor statute also provides strong evidence that Congress intended to allow restitution beyond the loss caused by the counts pleaded to by a defendant. Prior to 1983, the Probation Act was the statute that governed the award of restitution in federal cases. That statute provided that a defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had," 18 U.S.C. § 3651 (emphasis added) (repealed). That Congress chose not to add the underlined language to the Act convincingly demonstrates that the charge to which a

defendant is convicted does not establish the maximum restitution that can be ordered under the Act.

Finally, it is difficult to believe that Congress was unaware of the pervasiveness of plea bargaining in federal criminal cases when it passed the Act. "Since plea bargains often allow the defendant to be convicted of but a fraction of the charges leveled against him, a rule that the offense to which the plea is entered establishes the maximum restitution the court is allowed to order would in many cases minimize the restitution available to the victim of offense." Berrios, 869 F.2d at 30.

CONCLUSION

For the reasons stated this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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